

**IN THE SUPREME COURT
STATE OF FLORIDA
500 South Duval Street
Tallahassee, Florida 32399-1927**

**JASON ANDREW SIMPSON
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**Appeal No.: SC07-798
L.T. Court No.: 02-CF-1102**

**REPLY TO STATE’S ANSWER BRIEF TO DIRECT APPEAL,
PURSUANT TO FLA. R. APP. PRO. RULE 9.140(1)(a)**

On Appeal from the Circuit Court, Fourth Judicial Circuit, and For Duval County,
Florida

Honorable Charles W. Arnold
Judge of the Circuit Court, Division H

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PRELIMINARY STATEMENT

Appellant, JASON SIMPSON, will be referred to as “Appellant” or “Simpson.” The State of Florida will be referred to as “The State” or “Appellee.” Attorneys Frank J. Tassone and Rick A. Sichta, who are representing Appellant in this matter, will be referred to as the “undersigned counsel.” Counsel at the time of trial will be referred to as either “Mr. Eler” or “Mr. Fletcher,” or trial counsel.

References to the Record on Appeal will list the volume number of the ROA followed by the page number indicated on the Index to the Record on Appeal. Citations to the Initial Brief will be designated “IB” followed by a page citation. Citations to the State’s Response Brief will be designated as “AB” followed by a page citation.

SUMMARY OF THE ARGUMENTS IN REPLY

Issue One:

The state's case law and argument in support of the trial courts decision to deny counsel's repeated requests for a mistrial after having heard the juror in questions statement that the guilty verdict was non-unanimous is incorrect as the issue arose prior to the discharging of the Jury in the guilt phase and before the commencement of the penalty phase. The argument presented in the initial brief in and for this issue clearly cites the transcripts of the proceedings and no speculation was involved as to the demeanor of the juror in question.

Issue Two:

In the interest of the defendant's right to a fair trial, and with the apparent and noticeable discomfort of the juror asking to address the court, the court should have excluded the press and the victim's family from the court room when addressing the juror's issue with the verdict. Contrary to the state's position, neither the press nor the average citizen is constitutionally guaranteed access to proceedings. The defendant's right to a fair and impartial trial supersedes any right to access.

Issue Three:

The state's assertion that this issue was not preserved for appeal is incorrect as trial counsel clearly addressed the issue with the court after having moved for a

mistrial directly after it was raised. The court's decision to proceed to the penalty phase instead of granting a mistrial or ordering the jury to deliberate further was a clear violation of both Florida Rules of Criminal Procedure and case law.

Issue Four:

Given the magnitude of the issue raised by the juror, in that she stated that her and others believed that the verdict for guilt was non-unanimous, a jury interview should have been granted by the trial court. The brief questioning, and the contents of the questions, conducted by the court was wholly inadequate to address and resolve the gravity of the issue.

Issue Five:

The defendant restates and re-alleges the facts and argument as raised in the initial brief.

Issue Six:

The defendant restates and re-alleges the facts and argument as raised in the initial brief.

ISSUE ONE:

DID THE TRIAL COURT ERR IN DENYING A MOTION FOR NEW TRIAL WHERE A GUILTY VERDICT WAS RENDERED, YET PRIOR TO THE COMMENCEMENT OF THE PENALTY PHASE PROCEEDINGS; ONE JUROR STATED THE VERDICT WAS NOT UNANIMOUS?

The State attempts to admonish the Simpson's allegations by stating that Simpson is "speculating" as to Juror Cody's emotions and behavior as being timid. Moreover, the state attempts to discredit Simpson's issues by alleging that Juror Cody's statements to the trial court on February 6, 2007 were matters that inhered the verdict, thus rendering Simpson's juror Cody issue as "ineffectual to impeach the verdict and ineffectual to justify further inquiry" (i.e. jury interviews, clearing the courtroom of victim's family and the media, etc.). (AB, pg. 21)

The State takes issue that Simpson mistakenly and self-servingly bases appellate inferences upon his trial counsel's uncertain inference. However, Appellant makes fair comments on the evidence and testimony contained in the Record.

Defense counsel stated to the judge at trial that Juror Cody's demeanor during the initial jury polling was timid, uncomfortable, and that she was looking down when she stated her verdict.¹ Juror Cody evidenced a lack of understanding

¹ See Vol. XXII, pg 1830, "I'm concerned with her timidness and this is the juror that I think was looking down during the verdict." "I just feel with three rows of family and the press here, I think that's highly prejudicial to her...I just, I know how she would feel, Judge, and I'm concerned that would prejudice Mr. Simpson."

of the legal process, the given jury instructions, and decision process of the jury, as evidenced by the ROA.²

Finally, the fact that Juror Cody admits on the record that the decision reached was not a unanimous decision, and that it was not in fact her decision to find him guilty reinforces the fact that she was not affirmative in her verdict.³

Defense counsel at trial opined about Juror Cody's timidity, and that it was his opinion Juror Cody was the juror "that I think was looking down during her verdict." Based on the subsequent motions and actions that followed by defense counsel, which were denied by the court, but were not elaborated on in the court's sentencing order, Simpson's commenting on this aspect of the case was a fair inference from the facts presented below.⁴

Vol. XXII, pg. 1829, "Victim's family has taken up three or four rows in the courtroom. If we could clear the courtroom for questioning, Judge, if the Court is inclined to ask question. I think she's feeling very uncomfortable, obviously wanted to talk to you (the court)."

² See ROA, Vol. XXII pg. 1831, "I think there was a little bit of confusion." "I think that some people were under the impression, as well as myself, that we had to come to a unanimous decision before we left." Vol. XXII, pg. 1833, "Say some people, you know, feel that he's guilty and some people don't." "So basically was the objective to walk out of there with either all feeling he was guilty or all feeling that he was not guilty?" Vol. XXII, pg 1836, The Court: "...but was the guilty verdict your individual verdict based on what you heard?" Juror Cody: "No."

³ See ROA, Vol. XXII, pg. 1835, Counsel: "Now we asked you under oath was that your verdict when you found him guilty. Was that, in fact, your verdict." Juror Cody: "No." Vol. XXII, pg. 1836, "Yeah but that's...I kind of felt like I had to do that."

⁴ The state contends that because the trial court order held that the "jury was polled and all affirmatively stated" that the guilty verdict was in fact their "verdict as to

The state is correct in its timeline surrounding the Juror Cody issue. On January 29, 2007 the jury announced their verdict and each was polled and indicated same. (ROA Vol. XIX, pg. 1724). On February 1, 2007 and again on February 5, 2007, the trial court conducted hearings regarding issues that would concern the *upcoming penalty phase*. It is important to note that the jury was not present for these hearings (See ROA Volumes XX and XXI).

On February 6, 2007, prior to opening statements, Juror Cody expressed her concern with Simpson's guilty verdict and announced to the Judge's judicial assistant that "she would like a word with Judge Arnold". (ROA Vol. XXII, pg. 1826) Judge Arnold was then told by Juror Cody (in the presence of both sides) that "there were some questions that were unanswered before the verdict was made". (ROA Vol. XXII, pg. 1828)

The Defense then moved for a mistrial and also indicated it would do a motion for jury interview (ROA Vol. XXII, pg. 1828). The state's arguments however omit a crucial point, and that is the issue raised in the initial brief (IB pg.

each count," that the trial judge's order "explicitly found contrary to Simpson's self-serving inference." (RB, p. 23) Obviously the order did not discuss the timidness of jury Cody and the fact that she was looking down when she was polled as to her verdict. Saying yes when polled would give the trial court reason to say her verdict of guilt was "affirmative." Given the Court's elaboration in its order, it would seem that if the court disagreed with defense counsel's contention regarding Juror Cody, it would have certainly commented on this issue and included an analysis of why the court denied defense counsel's motions pertaining to this issue.

32-38) pertaining to the prior decisions reached in Walters v. State, 786 So. 2d 1227 (Fla. 4th DCA 2001), Chung v. State, 641 So. 2d 942 (Fla. 5th DCA 1994), and State v. Thomas, 405 So. 2d 220 (Fla. 3rd DCA 1981). As argued in the initial brief:

“The instant case is similar to Chung and therefore the holding in Chung should be followed. In both cases the jury was polled and each juror agreed that the verdict read was his or her individual verdict, but one juror did so with noticeable hesitancy. In both cases the hesitating juror notified the court before the jurors were discharged as to the verdict of guilt being not their verdict. The fact that the jury in Chung’s issue arose within a minute of polling and the issue in Appellant’s case arose after some days, does not defeat the argument. Appellant’s jury was still in control of the trial court, was still empanelled, still in the jury box, and was not discharged as to their original verdicts. *See People v. Bonillas*, 48 Cal. 3d 757 [*Holding that in a death penalty case the commencement of the penalty phase trial and the receipt of penalty phase evidence had the same effect as a discharge: the incalculable and irreversible effect of exposing the jury to improper influences.*]. *See also, The People v. Bolter*, 227 Cal. App. 3d 653 (Court of Appeal of California, 1991)

The facts demonstrated above show that Appellant is entitled to a new trial as with hesitation during the polling, and before the start of the penalty phase Juror Cody indicated that she did not concur with the verdict of guilty, and thereby there was not unanimity in the verdict. The trial court, aware of this ambiguity in the juror’s verdict and its unanimity, should have granted defense counsel’s motion for new trial/mistrial or ordered the jury to deliberate further. State v. Thomas, 405 So. 2d 220 (Fla. 3rd DCA 1981); *See also N.J. v. Milton*, 178 N.J. 421 (N.J. 2004)”

IB, pgs. 36-37

Judge Arnold in his Order denying motion for juror interviews candidly stated that the penalty phase *had not commenced* (Emphasis mine) when Juror

Cody requested to speak with the court. (V 863-64, 865-66) Juror Cody's "questions⁵ that were unanswered before the verdict was made" surfaced *before* commencement of the penalty phase, as noted by the trial court, and as cited in the procedural histories of the *Chung* and *Thomas* decisions.

The issue here is not whether Juror Cody's statements and allegations fall within matters which inhere in the verdict itself (which Simpson contests this assertion by the State), it is whether the verdict itself was official, and thus closing off any opportunities for the juror's to deliberate further⁶. When a verdict has not been reached before a jury is discharged, the only solutions to the problem are to either declare a mistrial, or to have the jury re-deliberate. (See *Walters v. State*, 786 So. 2d 1227 (Fla. 4th DCA 2001), *Chung v. State*, 641 So. 2d 942 (Fla. 5th DCA 1994), and *State v. Thomas*, 405 So. 2d 220 (Fla. 3rd DCA 1981)

The state alleges that because the "assertion of requiring the jury to re-deliberate its guilty verdict was not preserved through timely presentation to the trial judge," the issue was not preserved. On the contrary, if the jury is found not to have been discharged, the law requires the court to choose either of the two options available. See Fla. R. Crim. Pro. R. 3.440 and R. 3.450 [Providing that "unless

⁵ Including her statements to the Court that the verdict of guilty was not unanimous, and that other jurors believed Simpson was not guilty as well.

⁶ The trial court admitted that it did not find any case directly on point with the issue of when a jury is "discharged" in a factual scenario such as Simpson's, and the instant case was one of "first impression." (XXII 1757)

disagreement is expressed by one or more of the jurors, the verdict shall be entered of record and the jurors discharged from the cause, but no verdict may be rendered unless all the trial jurors concur with it. Rule 3.450 provides that if a juror dissents, the court must direct that the jury be sent back for further proceedings.].

In this case, it is evident from the record that counsel for Simpson made numerous motions for mistrial, however the court chose not to utilize either option available per the law. (See ROA Vol. XXII, pgs. 1828, 1839)

Continuing, the state argues that Simpson did not meet the burden of establishing that no reasonable person would have concluded that declaring a mistrial was an “absolute necessity.” (RB, pg. 28) In support of same, the State argues that it does not matter that Juror Cody expressed her concern regarding the divided verdict prior to the beginning of opening statements for the penalty phase of the Simpson trial. However, the fact is that if the jury is not discharged the verdict can be changed, and because the jury was not discharged and the penalty phase of the trial had not begun yet, the court had only two options, i.e., re-deliberation or mistrial. (See Walters v. State, 786 So. 2d 1227 (Fla. 4th DCA 2001), Chung v. State, 641 So. 2d 942 (Fla. 5th DCA 1994), and State v. Thomas, 405 So. 2d 220 (Fla. 3rd DCA 1981). The fact that there were jurors that did not

belief Simpson was guilty would also constitute why a mistrial was an “absolute necessity.”

The state takes great pains in explaining the time continuum: the jury returned their verdicts of guilt, then two pretrial penalty phase hearings were held, and approximately a week later Juror Cody expressed said concerns regarding the verdict. However, pre-trials are not trials. Pre-trials do not trigger jury deliberations, Double Jeopardy, potential mistrials, or other legal rights. Trials do.

The penalty phase had not yet begun, as the trial court correctly noted, before Juror Cody requested to speak with the court. (Vol. V, pg. 862) It follows then that the guilt phase had not ended when Juror Cody voiced her concerns. Despite what occurred before opening statements for the penalty phase of Simpson’s trial, this does not imply that the penalty phase had commenced.

The “absolute necessity” that the state says Simpson has not shown for warranting a new trial is the fact that the jurors, despite being polled, were not discharged and were not released. The cases cited in support of their contention that the jury was officially discharged and the guilt phase ceased before Juror Cody’s statements concerning her verdict to the trial court differ completely from the situation as presented in the instant case. (AB, pgs. 29-34)⁷ All of the cited

⁷ In support of their contention, the state cited: *Mitchell v. State*, 527 So. 2d 179 (Fla. 1988), *Devoney v. State*, 717 So. 2d 501 (Fla. 1988), *Johnson v. State*, 593

cases deal with Juror issues regarding the verdict either in non-death cases that have no penalty phase, or death cases whereby the penalty phase has already commenced and a death recommendation had been entered prior to the raising of the juror question. The state claims that this court “rejected claims similar to Simpson’s (AB, p. 33) that the verdict was final before Juror Cody’s statements”, however in none of the cases cited was the juror issue raised at the same time as in the instant case, and they are therefore distinguishable.

In Mitchell, the claim was raised regarding an event that occurred after the completion of *both* the guilt and penalty phase of trial, unlike what occurred in the instant case. Stacy, Pavon, and Devoney were not death cases, and in Johnson and Songer this issue was raised in a post conviction 3.850 motion for the first time, obviously long after the jury had been discharged.

The state next concentrates its attention on the definition and meaning of the word “verdict” and alleges that because a “verdict” was announced and finalized in the Simpson case, and that Juror Cody’s statements related to matters inherent in the jury deliberations, Simpson’s claim must fail. The State would like the court to believe that it is the verdict that matters and not when a jury is discharged. United States v. Marinari, 32 F. 3d 1209 (U.S. Court of Appeals, 7th Circuit) is persuasive. In Marinari, the court stated that “until a jury is actually discharged by separating

So. 2d 206 (Fla. 1992), Songer v. State, 463 So. 2d 229 (Fla. 1985), U.S. v. Pavon, 618 F. Supp. 1245 (Fla. S.D. 1985), U.S. v. Stacy, 475 F. 2d 1119 (9th Cir. 1973)

or dispersing (not merely being declared discharged) the verdict remains subject to review. (Citing Putnam Resources v. Pateman, 958 F. 2d 448 (1st Cir. 1992). When a jury remains an undispersed unit with the control of the court and with no opportunity to mingle with or discuss the case with others, it is undischarged and may be recalled., as a result, the verdict is not final or “recorded” as that term is used in Rule 31(d). Id. Summers v. United States, 11 F. 2d 583, 586 (4th Cir.), cert denied, 271 U.S. 1, 46 S. Ct. 632, 70 L. Ed. 1149 (1926) State v. Brown, 678 So. 2d 849, Fla. 3rd DCA 1996) is instructive on the issue also. Like Simpson, the jury was polled, and the verdict seemed unanimous. Before the jury was discharged (but after the jury was polled and the trial court was thanking the jurors), one of the jurors repudiated her verdict, stating that she had misunderstood a jury instruction (a matter that was inherent in jury deliberations). The 3rd DCA reasoned that under Fla. R. Crim. P. 3.450, the juror repudiated her verdict prior to being discharged. This case is informative in a few ways. Like Simpson, the jury was polled, the verdict seemed unanimous, and a juror, before the jury was discharged, repudiated her verdict. Secondly, the juror that repudiated her verdict did so because of a lack of understanding of a jury instruction, a matter which was inherent in jury deliberations, and not external factor or an overt act (although Simpson contests that Juror Cody’s statements were matters inherent in the jury deliberations). Finally, the Court held that under Fla. R. Crim. P. R. 3.540, because a juror

repudiated her verdict prior to being discharged (as, like in Simpson, the jury was still under the control of the court, still assembled and the penalty phase portion of the *trial* had not commenced), the trial court was required to direct the jurors to continue their deliberations, and if the jurors failed to reach unanimous verdict, the trial court was required to either declare a mistrial or to direct the jurors to continue their deliberations. *Id.* No preservation of the issue for the trial court to order the jurors to re-deliberate was given, as the court is required to do same under Fla. Crim. Pro. R. 3.450 if such a situation occurs.

Another appellate case illustrates the “discharged” issue. In *State v. Brown*, the court stated that the discharging of the jury is the ultimate factor in determining if members of a jury can be reconvened for the taking of any action involving the fate of the accused. 2006 Tenn. Crim. App. LEXIS 23 (Court of Criminal Appeals of Tenn., at Jackson; [Citing *Clark v. State*, 170 Tenn. 494, S.W. 2d 644, 646 (1936), [whereby the court held that “it is well-settled that a jury may not be reassembled to amend, correct, or impeach its verdict once the jury has been discharged. Both separation from the presence and control of the trial court and the possibility of outside contacts or influence are important elements in the determination of when a jury has been discharged.].

People v. Bonillas, 48 Cal. 3d 757 (1989), is insightful into this issue as well. In *Bonillas*, faced with an issue similar to Simpson's, the court held that in a

death penalty case the commencement of the penalty phase trial and the receipt of the penalty phase evidence has the same effect as a discharge, the incalculable and irreversible effect of exposing the jury to improper influences. *See also The People v. Bolter*, 227 Cal. App. 3d 653 (Court of Appeal of California, 1991).; *N.J. v. Milton*, 178 N.J. 421 (N.J. 2004); *Lee v. State*, 294 So. 2d 305 (Fla. 1974)[*Holding that as a general rule, once a jury is discharged it cannot be re-impaneled to hear matters ruling to the same case, This is so because after discharge the members lose their separate identity as a jury and because they are subject to outside influences.*].

The State is essentially pyramiding appellate inferences to arrive at their argument, citing cases where courts have held that once a “*verdict*” is returned it cannot be overturned if the jury matters concern *internal jury deliberations*. Both issues are the subject of this appeal. The state’s hypothetical of a verdict being attacked anytime before a defendant is sent prison is misplaced (AB, pg. 34).

Obviously a jury is gone long before the defendant would have a sentencing in a non-death case, thereby being discharged. The state explanation(s) and examples of when it believes a guilt phase ends and a penalty phase begins asks

that one believe that a criminal trial starts before jury was selected, and pretrial Motions in Limine are heard. (AB, pg. 34) ⁸

Moreover, the state ignores the fact that the trial court allowed the penalty phase to continue without fully resolving the juror Cody issue, stating that:

“my plan would be once they receive their recommendation, I would then have them all go back into the jury room again, ask Ms. Cody a few more questions and then make a decision whether questions would be asked of the rest of them or not an decision once that process is over they’ll go home, and proceeded to ask her more questions.” (XXII 1974-1980)

The penalty phase was allowed to commence before the Juror Cody issue was resolved and other jurors who expressed her same concern conversed with, thereby allowing Juror Cody (and the rest of the unnamed jurors that Juror Cody mentioned shared her belief that Simpson was not guilty) to hear additional prejudicial information concerning Simpson, his past, and aggravating factors. These jurors were no longer able to consider innocence because some had already found him guilty (per the verdict).

It comes as no surprise that after hearing testimony about how “bad” Mr. Simpson was from the state during the penalty phase⁹ that Juror Cody did not want

⁸ In the instant case the Judge said he wanted to go along with the penalty phase and not have further discussions and/or interviews with Juror Cody or any other jurors because “I wanted to give her undivided attention to the penalty phase issues.” (Vol XXII, pgs. 1756-57)

⁹ See XXII, pgs. 1922-1942. Specifically, the jury was told the following by the state: that Mr. Simpson was on felony probation, had a previous felony conviction

to reassert her previous statements that her and other jurors thought Mr. Simpson was not guilty of the instant crime.

The state also ignores the fact that since the courtroom was not cleared, it is impossible to know whether any other overt actions were taken on behalf of the jurors and/or whether external forces influenced Juror Cody or other Juror's verdicts¹⁰. The facts are that Judge Arnold denied Simpson's motion to clear the courtroom, after Juror Cody specifically requested to have a word with the *Judge*, not the media, not counsel, and not the victim's family, whom were all present and taking up space in at least three rows of the court.

Given the seriousness of the charges and the severity of the penalty sought by the state, and if the judge was concerned about excluding members of the media this issue should have been taken up immediately and a hearing held in order to determine if the media had any objections to being absent during Juror Cody's

(pg. 1927); that his previous conviction involved the use or threat of violence (pg. 1928); that during his previous conviction he used "fear", "violence", and "a gun" (pg. 1929); that during the course of the previous crime he wore dark clothing and stated that he would, "blow your MF head off" to the victim (pg. 1929); that he robbed and tied the victim up (pg. 1930); prejudicial argument from the state as to finding the HAC aggravator (pg. 1933-34); that he was "wicked" and "shockingly evil" (pg. 1934); a graphic and prejudicial depiction of the murders, his supposed reasoning for using an axe as the murder weapon (pg. 1937); a graphic, prejudicial, and imagined depiction of the blows to the victims (pg. 1937); and that Simpson calmly and coolly planned the murders (pg. 1938-41).

¹⁰ Juror Cody told the trial court, before the penalty phase commencement, that the verdict of guilty was not her verdict, and named approximately three other unidentified jurors who also expressed her view. (ROA, Vol. XXII, pg. 1835)

testimony to the Court.¹¹ Defense counsel was correct in requesting same be done, as defense counsel opined that Juror Cody was timid, and looking down, when her verdict was announced as being her own. The media, nor the victim's family, is absolutely guaranteed the right to be present during criminal proceedings. The first consideration is Simpson's right to a fair and impartial trial by a jury of his peers, not unduly influenced by external sources.

Because the jury was discharged as a result of the trial court allowing opening statements and evidence allowed to commence in the penalty phase of Simpson's trial, and because Juror Cody (and apparently other jurors) affirmatively stated to the trial court that the verdict of guilty was not their verdict, the verdict of guilty against Jason Simpson cannot be upheld, whereby the trial court should have ordered the jurors to re-deliberate or have granted Simpson's motion(s) for mistrial. Wherefore, Simpson requests a new trial be granted.

ISSUE TWO:

THE TRIAL COURT ERRED IN REFUSING TO CLEAR THE COURTROOM PRIOR TO INTERVIEWING JUROR CODY (RESTATED)

It is clear from the record that Juror Cody wanted and asked to speak with the Judge. (XXII 1826). Juror Cody specifically asked the trial court's Judicial assistant to speak with the Judge, and did not tell the Judicial Assistant she wanted

¹¹ The clearing of the courtroom issue is more fully explained below, in Simpson's "Issue Two."

to speak with defense counsel, the prosecution, or anybody else for that matter. Further, based on the opinion of defense counsel at trial, and as cited previously herein, Juror Cody was “timid,” and “uncomfortable” during polling of the jury and during her attempt to ask questions of the court. (XXII 1829-30)

Contrary to the state’s opinion, Juror Cody did not spontaneously “proceed to speak openly about her concerns,” but rather spoke about her concerns only after the trial court told her he cannot talk to her without everybody else being present. (XXII 1827). After hearing Juror Cody’s “questions that were unanswered before the verdict was made,” defense counsel moved for a mistrial stating there was “a question of guilt,” (XXII 1828).

Counsel expressed concern about the victim’s family occupying the first three rows in the courtroom and the press being present, and requested the court to clear the courtroom for questioning, stating “I think that’s highly prejudicial to her and I don’t know if the State objects to maybe going to chambers or something.” “I’m concerned that would prejudice Mr. Simpson”. (XXII 1829-30) Trial counsel was accurate in his assessment of the facts regarding this issue.

As stated in *United States v. Cunningham*, 108 F. 3d 120, 212 (7th Cir. 1997), the only external output of the jury’s function is the end product-the verdict. The lack of public scrutiny into jury’s function contrasts significantly with other aspects of criminal proceedings that fall within the First Amendment right to

access, such as pretrial hearings, voir dire, and trial itself. See also, *In re Globe Newspaper*, 920 F. ed at 94 [*Holding*, “clearly, there is no ordinary public right to “know” what occurs in the jury room. It is undisputed that the secrecy of jury deliberations fosters free, open and candid debate in reaching a decision.”

The lack of public scrutiny into the jury’s function contrasts significantly with other aspects of criminal proceedings that fall within the First Amendment right to access, such as pretrial hearings, voir dire, and the trial; *United States v. Koubriti*, 252 F. Supp. 2d 418, 422 (E.D. Mich. 2003) [*Holding that with a heightened level of media attention, the potential for juror harassment is increased. Such contact creates the risk that the juror’s verdict could rest on something other than the evidence admitted in this case. As recent history in this courthouse indicates, public disclosure of juror names during the pendency of a high-profile trial will increase the risk that external influences will be brought to bear on the jurors.*”];

Secondly, to transform juror’s personal lives into public news, especially where several jurors have already indicated sensitivity to this issue, could unnecessarily interfere with the juror’s ability or willingness to perform their sworn duties; *United States v. Cleveland*, 128 F. 3d 267 (CA 5, 1997)[*Holding that a “trial court might act to protect juror privacy by precluding jurors from revealing the statements other jurors made during deliberation; Doherty, supra at*

723[“for one juror to make public the thoughts ad deliberations of his or her colleagues in the deliberation room will ‘chill’ the free flowing process that our system encourages. Such safeguards protect the integrity of the jury system by building juror’s confidence that their comments during deliberation will not become public knowledge without the juror’s consent.].

Upon Mr. Eler’s request that Simpson would be prejudiced if the courtroom was not closed as the result of Juror Cody’s actions, a factual inquiry should have been made by the trial judge as to whether closure of the courtroom will prevent the asserted prejudice, and the court must find specifically that no reasonable alternative short of closure of the courtroom will protect Simpson’s right to fair trial. See Press-Enterprise II, 478 U.S. at 8, 106 S. Ct. at 2740; See also, In re Application of Daily News, 787 F. Supp. 310 (U.S. Dist. Court, Eastern Dist. Of N.Y. 1992); United States v. Edwards, 823 f. 2d 111 (5th Cir. 1987)[*Holding that “if the questioning of impaneled jurors were held in open court, there is a substantial probability that what may have begun as a “tempest in a teapot” will end in a mistrial, a hung jury, or a reversal on appeal. The interest in preserving the jury as an impartial, functioning, deliberative body is not only a higher value than that served by openness here, it is a sine qua non of our system of criminal justice as envisioned by the Sixth and Seventh amendments. Thus, For First amendment purposes, no presumption of openness attaches to proceedings*

involving the mid-trial questioning of jurors. It follows that the trial judge did not err in failing to provide a pre-closure hearing]; United States v. Kemp, 366 F. Supp. 2d 255 (U.S. District Ct., Eastern District of Penn. 2005) [*concluding that it's decision not to release the juror notes to the media, and to maintain the transcripts of the proceedings with counsel and also the individual voir dire with the jurors, as sealed, was sound, inasmuch as the jury was continuing to deliberate. The court believed that releasing the information to the public could have had an adverse effect on continued deliberations and the ability of the jury to reach a verdict. The court believed that there was no right of access to problems which the jurors perceived were preventing them from deliberating as per their sworn duty*]. With regard to importance of not intruding upon jury deliberations, the Supreme Court has stated:

“Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world...No doubt the need is weighty that conduct in the jury room shall be untrammelled by the fear of embarrassing publicity.” Clark v. United States, 289 U.S. 1, 13, 77 L. Ed. 993, 53 S. Ct. 465 (1933)

See also Southeastern Newspapers Corp. v. State, 265 Ga. 223 (Ga. 1995)[*Court held that in defendant's capital murder action, the trial court granted defendant's request to close the pretrial proceedings, concluding that extensive and prejudicial publicity created a severe danger of rendering it impossible to secure a fair and impartial jury and that highly sensitive and prejudicial matters*

might have been disclosed to potential jurors, and that closing said hearings to the press and to the public in the death penalty case was the only means by which a “clear and present danger” to defendant’s right to a fair and public trial could be avoided because sequestration of the jury was not an alternative prior to the commencement of the trial.”].

The proper predicate was laid in the Simpson case to require the trial Judge to, at the minimum, hold a hearing on the issue and give the press adequate notice that the courtroom would be closing on a limited basis of eliciting testimony from Juror Cody as to the reasons why her verdict of guilty was not her verdict, as well as the agreeing yet unnamed jurors. The press, nor the victim’s family, have an absolute right to access to criminal proceedings. *In re Knight Pub. Co.*, 743 F. 2d . 231 (1984) In fact, no right ranks higher than the right to the accused to a fair trial. *U.S. v. Black*, 483 F. Supp. 2d 618 (US District Court, Northern District of Illinois, Eastern Division, 2007)[*Holding that there was no logical connection between public access to juror names during the pendency of the trial and the proper functioning of the jury. In light of the intense media scrutiny surrounding the case, the court found that releasing juror names unnecessarily threatened the defendant’s Sixth Amendment rights*]; *Neder v. United States*, 464 U.S. at 527 U.S. 1, 30, 119 S. Ct. 1827 (1999)(Scalia, J. in dissent, “when the Court deals with the content of the guarantee [to a trial by impartial jury]- the only one to appear in

both the body of the Constitution and the Bill of rights- it is operating upon the spinal column of American democracy; United States v. Doherty, 675 F. Supp. 719, 722 n. 4 (D. Mass 1987)[holding that “the right of the Court to protect the anonymity of the jury through trial, deliberations, and verdict appears undoubted and neither newspaper seeks to challenge it here...before turning from the historical analysis, however, it is appropriate to note that t immediate unrestricted post verdict access to jurors I contrary to the general norm and historical practice of American court and this Court takes Judicial notice of that fact.”

In fact, the right to access to criminal proceedings must be balanced against other compelling interests protected to the U.S. Const., such as the right of the accused to a fair trial, and the right to an open trial gives way, under certain circumstances, to an accused’s right to same. Waller v. Georgia, 467 U.S. 39, 45, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984). See also Press-Enterprise II, 478 U.S. at 13-14, 106 S. Ct. at 2742-43 [Court holding that party moving for closure has the burden of proving that “higher values” will be infringed by publicity; that closure of the courtroom will prevent such prejudice; and that reasonable alternatives to closure cannot protect the asserted values. In re Dallas Morning News co., 916 F. 2d 205, 190 U.S. App. LEXIS 18481 (5th Cir, 1990) recognized that the very act of requesting in camera questioning could compromise the candor of a venire member’s response to sensitive questions. Closed proceedings are not absolutely

precluded, and if there is cause shown that outweighs the value of openness, a proceeding can be closed. See Miami Herald Publ. Co. v. Lewis, 426 So. 2d 1 (FSC 1982)

The State's cited cases in support of their argument are unpersuasive, as such cases as Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 509 (1984), Palm Beach Newspapers, Inc. v. Burk, 504 So. 2d 378 (Fla. 1987), specifically deal with the court's closure of *voir dire proceedings*, *pretrial depositions*, and not a death penalty case where a juror has expressed her concern over her guilty verdict before the commencement in opening statements for the subsequent penalty phase.

In fact, the state uses a test summarized in Bundy v. State, 455 So. 2d 330 (Fla. 1984) to clear a courtroom that was premised on clearing a courtroom for a *pretrial proceeding or seal the record thereof in a criminal case*, not a death penalty case where a juror states a guilty verdict was not her verdict.

The "cause" the state says Simpson did not show for the reason(s) why the public (i.e. the press and the victim's family) should have been cleared from the courtroom are clear from the record: (1) Juror Cody wanted to speak to the judge, not to the public, defense counsel, or the prosecutor (2) defense counsel's statements to the court as to what he viewed as to the emotions and behavior of Juror Cody (timid, looking down, uncomfortable, etc.) (3) the fact that Juror Cody

stated that other jurors agreed that Simpson was not guilty (XXII 1831) (4) the fact that this is a death case, and the jury had not been discharged when a question of whether the verdict was true and correct. Prejudice has been shown. Deference goes to the defendant in a criminal case before the rights of all others, including the family of the victim and/or the press. *See Waller v. Georgia*, 467 U.S. 39, 45, 81 L. Ed. 2d 31, 104 S. Ct. 2210 (1984).

In summary, the trial court, after hearing Juror Cody's requests that she would like to speak to the judge, hearing her express that the verdict was not in fact hers, having heard Simpson's counsel's statements that Juror Cody looked timid and uncomfortable, and given that was aware that the press and three rows of the victim's family were present in court, should have closed the courtroom. Juror Cody stated that the guilty verdict was not her own, and stated that other unnamed jurors agreed with her.

Given that this was a death case, that this was not a pretrial proceeding and/or jury selection, and instead dealt with jury deliberations and issues pertaining to the verdict and whether the verdict was unanimous, the judge should have cleared the courtroom. This was not harmless error. The penalty phase had not commenced at this point, nor had the jury been discharged when Juror Cody told the court that the jury verdict was not unanimous. By telling Ms. Cody she had to speak in front of everybody in court, the trial judge compromised the impartial,

functioning, and deliberative job of the jurors. Thereby not freeing them from outside influences or pressures, and interfering with their ability to perform their sworn duties, thus enhancing the risk that the jury would be not be able to function as it should, in secrecy and free from any outside influence. *United States v. Doherty*, 675 F. Supp. At 725 n. 7 (1987). The parties were not able to elicit the names of the other jurors that did not agree with the jury verdict. Simpson was the accused in this case, and no right ranks higher than the accused's right to a fair trial. Whereby Simpson should be given a new trial.

ISSUE THREE:

DID THE TRIAL COURT ERR IN ALLOWING THE JURY TO PROCEED TO THE PENALTY PHASE AFTER JUROR CODY'S STATEMENTS TO THE COURT INDICATED THAT THERE WAS NOT A UNANIMOUS VERDICT IN THE GUILT PHASE OF TRIAL? (RESTATED)

In their answer brief, the state argues this issue was unpreserved at the trial level. (AB, pg. 46) However, it was clear from the record that a specific contention was asserted as a legal ground for an objection. Specifically, before commencement of the penalty phase proceedings, and after Juror Cody's statements concerning the non-unanimous nature of the jury's verdict, Simpson's counsel moved for mistrial and stated that he didn't think "we can proceed penalty-wise if there's a question of guilt and she's raised it. (XXII 1828)

After further questions were asked of Juror Cody, with her stating the guilty verdict was not hers and stating that "some people feel he's guilty and some people

don't" (XXII 1833), Defense counsel again moved for a mistrial, stating that Juror Cody indicated that the verdict was not unanimous and the verdict of guilty was not her vote. (XXII 1839). The trial judge denied said motion for mistrial "at this time", allowing trial counsel to make further inquiry later if he chooses (XXII 1839-1840). The trial court then proceeded to the penalty phase and after the presentation of evidence and closing arguments, stated

"my plan would be once they receive their recommendation, I would then have them all go back into the jury room again, ask Ms. Cody a few more questions and then make a decision whether questions would be asked of the rest of them or not an decision once that process is over they'll go more, and proceeded to ask her more questions." (XXII 1975)¹²

The state attempts to argue that the guilt phase of Simpson's trial was complete, as the juror Cody issue did not surface until a week after the jury's verdict was given and the jury was polled. (AB, pg. 48) However, even the trial Judge disagreed in part to this argument, when he stated in his order that the Juror Cody issue appeared before the penalty phase began, as cited by the state in the Response brief. (AB, pg. 20)

Moreover, the guilt phase jury was not discharged for the guilt phase until the commencement of opening statements and evidence for the penalty phase began. *See People v. Bolter*, 227 Cal. App. 3d 653 (Ct. of Appeal., Cal., 4th App.

¹² Defense counsel then asked the court to ask Ms. Cody who the other jurors were that were disagreeing and to ask her if she remembers being hesitant when she was initially polled. (ROA, pg. 1983)

Distr. Div. Three 1991); *People v. Hughes* (1959) 171 Cal. App. 2d 362; *People v. Bonillas*, supra 48 Cal. 3d 757 [*Collectively holding that in a capital trial the guilt phase ends and the penalty phase commences when evidence admissible only at the penalty phase had been introduced, and the commencement of the penalty phase trial and the receipt of penalty phase evidence which had the same effect as a discharge, and a judge cannot have a jury complete its guilty phase verdict once the penalty phase has commenced.*]. (*Id.* At p. 774)

Allowing the jury to proceed through the penalty phase in a decide-now-ask-questions-later-approach¹³ allowed the jury to succumb to internal influences, having the “incalculable and irreversible” effect of exposing the jury to improper influences. See *People v. Bonillas*, 48 Cal. 3d 757. Juror Cody and other jurors (according to Ms. Cody’s statements) were then forced into deciding whether Simpson deserved to be executed before they were allowed to finish making a determination as to whether he was guilty of the crime they were being asked to decide his life on. Any lingering doubt, and whether Simpson was indeed not guilty of the offenses, was then left behind leaving only a determination of whether the “facts” given in the penalty phase were deserving of the death penalty. As such,

¹³ The trial judge made it clear after Juror Cody expressed her concern regarding the guilty verdict that he was not going to continue questioning of her (or other jurors for that matter) until the jury had made a recommendation of life or death. (XXII 1975)

the jury then heard specific details about Simpson's prior acts, which, contrary to the state's analysis¹⁴, were prejudicial to Simpson.

Lastly, allowing the jury to proceed to the penalty phase had the same effect as a discharge in a non-penalty case, thereby ending the jury's ability to be re-empanelled to hear further matters relating to the guilt phase. Because of Juror Cody's statements that the verdict was not unanimous and coupled with the fact that the penalty phase had not yet commenced, the trial judge's only options were to order the jury to re-deliberate as to the guilt phase, or grant Simpson's motion for mistrial. *State v. Thomas*, 405 So. 2d 220 (Fla. 3rd DCA 1981); *N.J. v. Milton*, 178 N.J. 421 (N.J. 2004). Prejudice is proven.

As stated previously, the state attempts to imply that simply listing the number of convictions equates to stating the facts of the crimes in which the convictions were gained. Common sense dictates this is not the case, as details of the case are necessary in death cases where the state attempts to prove aggravating factors, such as a prior violent felony. In the instant case, and as discussed previously, in the penalty phase the state introduced Simpson's previous crime of Robbery and went into a graphic description of the events and details of how

¹⁴ The state seems to suggest that because Simpson testified regarding his prior felonies and that he was involved with criminals that there was no prejudice in allowing the jury to hear about Simpson's prior crimes. However, hearing that one was convicted of a crime is very different from hearing graphic and exaggerated details of how one committed the crime he/she was convicted of.

Simpson robbed Preston Johnson. (XXII 1929-30) This vivid description is far more damaging when heard by a jury than a simple list of a defendant's prior convictions.

Wherefore, based on the facts and case above, Simpson should be granted a new trial.

ISSUE FOUR:

DID THE TRIAL COURT REVERSIBLY ERR BY REFUSING TO GRANT A JURY INTERVIEW AS THE RESULT OF JUROR CODY'S STATEMENTS TO THE TRIAL COURT?

It is clear from the record that Juror Cody, before the commencement of the penalty phase, indicated to the court and the parties involved that the verdict of guilt was not unanimous, she did not think Simpson was guilty, and that other jurors felt Simpson was not guilty. (XXII 1833, 1836) It was also clear that the issue regarding the preservation of the request for jury interview was addressed before and during the penalty phase.¹⁵

¹⁵ Prior to the commencement of the penalty phase, Simpson's trial counsel requested a jury interview. (XXII 1828), and stated he didn't think "we can proceed penalty-wise if there's a question of guilt and she's raised it." It should be noted that Juror Cody, prior to the commencement of the penalty phase, did indicate there were other jurors who expressed her desire to find Simpson not guilty. (XXII 1833) Moreover, defense counsel again requested a juror interview prior to the last penalty phase witness (XXII 1910-11), and again when the jury retired to deliberate on Mr. Simpson's fate. (XXII 1974), and then twice more after the jury returned its death recommendations, one oral and one written. (XXII 1982, 824-26).

Juror interviews should be granted in certain situations. *See Pozo v. State*, 963 So. 2d 831 (Fla. 4th DCA 2007) [*Holding that the trial court erred in denying the motion to interview the jurors because it was clear that's defendant's motion presented a reason to believe the jury verdict was subject to challenge, as after the verdict a juror wrote to the trial judge stating that during jury deliberations the sheriff's office (who were clearly identified at trial) might harass the jurors if they returned a not guilty verdict, and that she felt pressured to vote guilty.*”].

Juror interviews are granted and jurors are allowed to testify about overt acts and/or external influences which had the possibility of prejudicially affecting the jury in reaching a verdict. *Id.* In the instant case, the state continues its assertion that the jury deliberations involved questions that inhered to the verdict itself, that the juror was influenced by the jurors themselves and not external influences, or other matters resting in the juror's mind. This however is not a correct assertion.

Juror Cody stated that the verdict of guilt was not unanimous, that other jurors expressed her same view, and that “the way it [the evidence] was explained to them was the evidence went to the physical evidence”. (XXII 1834-35) Jury deliberations and weighing were not the reason she came back with a verdict of guilty. (XXII 1838) Juror Cody asked to speak to the Judge only, Defense counsel stated to the judge that Juror Cody appeared to be feeling very uncomfortable, and

obviously wanted to talk with the judge, and that there were three rows of the victim's family in the front of the courtroom. (XXII 1829)

The aforementioned facts show that although some matters were involving issues inherent in the jury verdict and/or deliberations, there were other issues concerning whether or not external influences were involved and/or whether a type of agreement was reached by two or more jurors to disregard ignore the law. *See Baptist Hosp. of Miami v. Maler*, 579 so. 2d 97 (Fla. 1991) To complicate matters, the Judge avoided questioning Juror Cody about issues involving overt prejudicial acts of the jurors and/or external influences. In fact, the trial court tailored the questioning solely to matters inherent in the verdict¹⁶, and compounded the issue by allowing three rows of the victim's family (not including the present media) while Juror Cody spoke about unanimity of the verdict.

The trial judge abused its discretion in denying Simpson's motion for jury interview, and a new trial should be granted.

ISSUE FIVE:

DID THE COURT COMMIT REVERSIBLE ERROR BY FAILING TO MAKE A DEFINITIVE RULING ON SIMPSON'S "MOTION FOR PRE TRIAL RULING ON ADMISSIBILITY OF "REVERSE" WILLIAMS RULE

¹⁶ See XXII 1835, "So some of your fellow jurors were saying that you should count some part of the evidence more than other parts of the evidence?" "That is as far as weighing the evidence?" XXII 1836, "You felt like you had to because other jurors had persuaded you to do that right?" "...after they persuaded you to rely on certain evidence over other evidence, you decided to vote guilty. Is that what basically happened?"

EVIDENCE,” THEREBY NOT ALLOWING DEFENSE COUNSEL TO ADDRESS RELEVANT IMPEACHMENT INFORMATION PERTAINING TO STATE WITNESSES WHICH PREJUDICED SIMPSON AT TRIAL?

Simpson relies on the arguments presented in his Initial Brief for this issue.

(IB, pgs. 53-55).

ISSUE SIX:

DID THE STATE COMMIT PROSECUTORIAL MISCONDUCT IN THE GUILT AND PENALTY PHASE CLOSING ARGUMENTS AT TRIAL THAT RISE TO THE LEVEL OF FUNDAMENTAL ERROR, WHEREBY SIMPSON IS ENTITLED TO A NEW TRIAL AS A RESULT?

In response to the State’s Answer Brief, Simpson relies on the facts, arguments, and case law provided in his Initial Brief. (IB, pgs. 55-61).

CONCLUSION:

The facts and the circumstances above show that Simpson is entitled to a new trial. The Juror Cody issue and her statements concerning the non-unanimous nature of the guilt phase verdict was presented and heard to the court before the commencement of the penalty phase and before the jury was discharged from the guilt phase, thus requiring the trial court to order the jurors to re-deliberate and/or grant a new trial. The trial court also erred in denying Simpson’s motion for jury interviews and to clear the courtroom, and as a result Simpson was prejudiced as juror was not allowed to properly perform its role and remain an impartial jury, and as a result Simpson was denied his right to a fair trial under the Fifth, Sixth, and

Fourteenth Amendments of the Florida and U.S. Constitutions. A new trial should be granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent via U.S.

Mail to all counsel of record, on this 23rd day of May, 2008.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE AND AS TO FONT

I **HEREBY CERTIFY** that this brief is submitted by Appellant, using Times New Roman, 14 point font, pursuant to Florida Rules of Appellate Procedure, Rule 9.210. Further, Appellant, pursuant to Florida Rules of Appellate Procedure, Rule 9.210(a) (2), gives Notice and files this Certificate of Compliance as to the font in this immediate brief.

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